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No. 87-1890

In the Supreme Court of the United States

OCTOBER TERM, 1988

LUCIANO PISONI FABBRICA ACCESSORI INSTRUMENTI MUSICALI, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that the court of appeals erred in affirming the lower court's finding that, for purposes of the Equal Access to Justice Act (EAJA), 28 U.S.C. (& Supp. IV) 2412(d)(1)(A), the government's position was "substantially justified."

1. Petitioners are the producer and the importer of pads for woodwind instrument keys from Italy. In 1984, the Department of Commerce issued an order assessing an antidumping duty on these pads, finding that petitioners were importing them at less than fair market value under the Tariff Act of 1930, 19 U.S.C. 1673d(a).[1] Pet. App. B3-B4. Petitioners sought judicial review of this

[1] The antidumping law is designed to remedy unfair trade practices by requiring the imposition of an additional duty on goods imported at less than fair value, determined by comparison with prices charged for the same goods on the home market (Pet. App. A2-A3, D2-D3).

determination in the Court of International Trade (CIT), which ruled that the Commerce Department was justified in initiating and continuing the antidumping investigation (Pet. App. D9-D12). The court did, however, fault the Department's analysis in two respects: The court found that the agency's failure to allow for differences in the local size ranges in comparing prices on the home market and in this country "was unreasonable and not in accordance with law" (*id.* at D17-D18), and that in making the required currency conversions, the agency's use of quarterly exchange rates rather than daily rates was "not reasonable" in light of the limited number of home market sales used for the comparison (*id.* at D21-D22). The CIT accordingly remanded the case to the agency for redetermination. Upon remand, the Department found that the average difference in price between home market and U.S. sales was de mininis and revoked the dumping order as to petitioners. *Id.* at A3-A4.

2. Thereafter, petitioners applied to the CIT for attorneys fees and expenses pursuant to EAJA. Noting that EAJA provides for an award of fees to a party who prevails in litigation against the government unless the government's position was "substantially justified," a test that the court of appeals had previously interpreted to require the government to show that its position was "*clearly* reasonable" (*Gavette* v. *Office of Personnel Management*, 808 F.2d 1456, 1467 (Fed. Cir. 1986) (emphasis in original)), petitioners asserted, as they do here, that since the court had found on the merits that the government's actions were unreasonable, the government's position could not have been "substantially justified" for EAJA purposes. The CIT disagreed. It explained that although the standard for review on the merits is whether the agency action is supported by substantial evidence (19 U.S.C.

1516a(b)(1)(B)), Congress in EAJA provided a separate standard, thus requiring "an analysis under an EAJA perspective [that is] independent from the decision on the merits" (Pet. App. B14). Undertaking that analysis, the court concluded that the size range issue was "novel and complex" and that the agency's determination "was clearly reasonable in light of the law, regulations and facts as they existed at the time" (*id.* at B20). Similarly, the court found that the agency's use of quarterly conversion rates was "clearly reasonable" on the particular facts in this case and that "in this evolving area of the antidumping laws Commerce did not persist in pressing a tenuous factual or legal position" (*id.* at B24). The CIT thus denied EAJA fees.

The Federal Circuit affirmed. Using the same analysis as the CIT, it rejected the proposition that the government's loss on the merits foreclosed it from demonstrating that its position was substantially justified for EAJA purposes (Pet. App. A8-A9). Examining the government's conduct "through the EAJA 'prism' " (*id.* at A9, quoting *Federal Election Comm'n* v. *Rose*, 806 F.2d 1081, 1090 (D.C. Cir. 1986)), the Federal Circuit reviewed the facts, the pertinent regulations and the case precedents (Pet. App. A11-A18), and determined that the CIT's conclusion that the government's position was substantially justified was not clearly erroneous. Indeed, it concluded that "[a]part from [petitioners'] attempted equation of the government's loss on the merits with its entitlement to fees and expenses, nothing was argued to us that would suggest the court was wrong in [its] assessment" (*id.* at A18-A19).

3. The decision below is entirely consistent with this Court's decision in *Pierce* v. *Underwood*, No. 86-1512 (June 27, 1988), decided after this petition was filed. Further review is accordingly not warranted.[2]

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[2] *Pierce* v. *Underwood, supra,* resolved any prior conflict in the circuits about whether the EAJA "substantial justification" standard

a. Petitioners' contention that the CIT's holding on the merits is dispositive of the substantial justification determination is precluded by the reasoning of this Court in *Pierce* v. *Underwood, supra.* As the Court there stated, "a position can be justified even though it is not correct, and we believe it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact" (slip op. 12 n.2).[3] This is precisely the approach followed by the courts below in this case. As the court of appeals noted, the decision on the merits reflects the application of a different standard of review, which is not controlling on the EAJA issue, "regardless of the words chosen to announce

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requires a showing of something more than reasonableness (see Pet. 9-10). In light of *Pierce*, it is clear that to meet the EAJA test, the government's position must have simply "a 'reasonable basis both in law and fact' " (slip op. 12 (citation omitted)).

Petitioner's alternative contention (Pet. 10-11) that the decision below is somehow inconsistent with *Federal Election Comm'n* v. *Rose*, 806 F.2d 1081 (D.C. Cir. 1986), is entirely without merit. The court in *Rose* refused to equate a finding on the merits that the government's action was arbitrary and capricious with a lack of substantial justification for EAJA purposes. Relying on a substantially similar analysis, the court below refused to equate a finding on the merits that the government's action was unreasonable in the sense that it was unsupported by substantial evidence with the EAJA standard (Pet. App. A6-A11).

Finally, to the extent that the Third Circuit had, before *Pierce*, accepted the analysis advocated by petitioner, that circuit has been directed to reconsider its position in light of *Pierce*. See *Russell* v. *Heckler*, 814 F.2d 148 (1987), vacated and remanded, No. 86-251 (June 30, 1988). See also *Trahan* v. *Regan*, 824 F.2d 96, rehearing en banc granted, 832 F.2d 158 (D.C. Cir. 1987).

[3] See also slip op. 7, noting that the EAJA question "will not be precisely the same as [the question on] the merits: [the EAJA question will be] not what the law now is, but what the Government was substantially justified in believing it to have been."

[the merits] conclusion" (Pet. App. A8). See also *Hadden* v. *Bowen*, No. 87-1469 (10th Cir. July 20, 1988), slip. op. 5-6.

b. Petitioners' final contention (Pet. 12-13), that the government's position in this case was not substantially justified, is entirely factbound. In any event, both courts below evaluated the government's position on both points that led to the remand and concluded that the government had acted reasonably in light of the facts and legal precedent available to it at the time.[4] There is no need for further review of that question.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

AUGUST 1988

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[4] The Federal Circuit conducted its review of the lower court's finding under the "clearly erroneous" standard because it concluded that the determination that the Government's position was "substantially justified" under the EAJA was a factual one (Pet. App. A10-A11). In *Pierce* v. *Underwood*, this Court established that the proper standard for review in EAJA cases is "abuse of discretion" (slip op. 9). We do not believe that any possible theoretical difference in the two standards of review could lead to a difference in result in this case, where the court of appeals concluded that "Commerce considered the issues in a thoughtful and thorough manner" (Pet. App. A14), and "carefully considered the issues * * * and provided reasonable explanations for its approach" (*id.* at A18).

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